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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )

Amendment of the Commission's Rules  
Regarding Installment Payment Financing for  
Personal Communications Services Licenses )

DOCKET FILE COPY ORIGINAL

WT Docket No. 97-82

Order on Reconsideration of the Fourth Report  
and Order )

**OPPOSITION OF VOICESTREAM WIRELESS CORPORATION**

VoiceStream Wireless Corporation ("VoiceStream"), by its attorneys and pursuant to the Commission's Public Notice, DA 00-760, released April 5, 2000 and Section 1.429(f) of the Commission's rules, 47 C.F.R. § 1.429(f), hereby opposes the joint Petition for Reconsideration filed by Sprint Spectrum L.P. ("Sprint") and US WEST Wireless LLC ("US WEST") in the captioned proceeding. In support hereof, it is respectfully shown as follows:

Less than two months ago in its *Order on Reconsideration of the Fourth Report and Order* ("Order on Reconsideration"), the Commission decided not to liberalize eligibility or bidding credits for upcoming C and F Block auctions for existing designated entities ("DEs").<sup>1</sup> Those decisions were made after nearly two years of deliberation.<sup>2</sup> The Commission reasoned that "fairness to other future bidders prevents our providing an

<sup>1</sup> See *Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services*, Order on Reconsideration of the Fourth Report and Order, WT Docket No. 97-82 at ¶¶ 2, 4 (rel. Feb. 29, 2000) ("*Order on Reconsideration*").

<sup>2</sup> See *Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services*, Fourth Report and Order, 13 FCC Rcd 15743 (1998).

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open eligibility standard indefinitely.”<sup>3</sup> Moreover, the Commission did not want to “undermine the effectiveness of bid credits in aiding entities that currently qualify as smaller businesses.”<sup>4</sup>

Pursuant to Section 1.429(c), a petition for reconsideration must generally rely on facts which have not previously been presented to the Commission, rather than reiterating arguments made prior to the Commission's final action.<sup>5</sup> US West and Sprint (collectively, “Petitioners”) fail to proffer any new facts warranting review of the Order on Reconsideration. The record developed in the two proceedings related to the conduct of the PCS reauction (the “reauction proceedings”),<sup>6</sup> which Petitioners ask the Commission to “fold in” to this proceeding, does not establish new facts regarding eligibility, disaggregation or the spectrum cap. The comments in the reauction proceedings merely demonstrate that some parties want to dismantle the existing

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<sup>3</sup> *Order on Reconsideration at ¶ 8.*

<sup>4</sup> *Order on Reconsideration at ¶ 10.*

<sup>5</sup> *See In the Matter of Revision of the Commission's Rules To Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, 12 FCC Rcd 22665, 2272 (1997).

<sup>6</sup> *See Petition of SBC Communications for a Waiver of the Eligibility Requirements of 47 C.F.R. § 24.709 for the PCS Frequency Blocks C and F Auction to Begin on July 26, 2000; Petition of Nextel Communications Inc. for Expedited Rulemaking or, in the Alternative, Waiver of the Commission's Rules*, DA 00-145 and DA 00-191. The other reauction proceeding involved petitions for waiver or forbearance of the spectrum cap with respect to the reauction. *See AT&T Wireless Services, Inc. Petition for Waiver of the CMRS Spectrum Cap Requirements of 47 C.F.R. § 20.6 for the PCS Frequency Blocks C and F Auction to Begin on July 26, 2000; BellSouth Corporation Petition for Waives of the CMRS Spectrum Cap Requirements of 47 C.F.R. § 20.6 and the Eligibility Restriction of 47 C.F.R. § 24.709 for the PCS Frequency Blocks C and F Auction to Begin on July 26, 2000; Bell Atlantic Mobile, Inc. Petition for Limited Forbearance from the Spectrum Cap for the Reauction of Broadband PCS Licenses*, DA 00-318.

structure and even more who wish to keep it intact. When the Commission released its Order on Reconsideration, petitions filed by SBC and Nextel in the reauction proceedings requesting relief from the DE eligibility restrictions, were before the agency.<sup>7</sup> So too were petitions seeking relief from the spectrum cap.<sup>8</sup> Notwithstanding these related, collateral proceedings, the Commission decided on February 29, 2000 to keep the DE regime essentially intact and did not make any change regarding the cap. Since release of the Order on Reconsideration, nothing has changed. In the absence of new facts undermining the decisional basis on which the Order on Reconsideration rests, the Commission should decline the Petitioners' invitation to make the DE and spectrum cap rules an endlessly moving target.

If the Commission's decision in this docket is going to be driven by an arbitrary date for a single scheduled auction, rather than normal rulemaking processes, then the Commission, whatever it does, must be fair. This means that in the case of the DE rules, if they are to be altered for the auction, they must be altered for existing DEs: restrictions on the sale or transfer of C and F Block licenses must be lifted. Likewise with respect to any relief carved out for the next PCS auction in connection with the spectrum cap: similarly situated parties must be treated in a fair and non-discriminatory manner throughout the wireless industry.

## **II. VoiceStream Opposes Expedited Rulemaking**

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<sup>7</sup> See Public Notice, *Wireless Telecommunications Bureau Seeks Comment on Nextel Communications, Inc.'s Petition Regarding Pcs C And F Block Spectrum*, DA 00-191 (Feb 3, 2000).

<sup>8</sup> See Public Notice, *Wireless Telecommunications Bureau Seeks Comment on AT&T Wireless Services, Inc., BellSouth Corporation and Bell Atlantic Mobile, Inc. Petitions Regarding CMRS Spectrum Cap Limits*, DA 00-318 (Feb. 18, 2000).

Petitioners propose an expedited rulemaking to determine how the Commission's rules will apply to the July 26 reauction. Expedited rulemaking proceedings have been found consistent with the Administrative Procedure Act, 5 U.S.C. Section 555, where there was "urgent necessity for rapid administrative action under the circumstances"<sup>9</sup> or a statutory deadline for the Commission to act.<sup>10</sup> Neither is present here. In contrast to the 700 MHz auction with its September 2000 statutory deadline, the scheduling of the July 26 reauction is not an "urgent necessity."<sup>11</sup>

The Commission should not allow itself to be pressured into a hurried and piecemeal formulation of policy by the exigency of holding a single auction. The FCC may not resolve only some of the issues raised in a rulemaking proceeding when the issues decided are inextricably related to issues deferred until a later rulemaking.<sup>12</sup> The Court of Appeals for the District of Columbia Circuit has held that, "an agency does not act rationally when it chooses and implements one policy and decides to consider the merits of a potentially inconsistent policy in the near future."<sup>13</sup> Inconsistent rulemaking decisions are contrary to the principle of regulatory certainty. Only 5 months ago, in its

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<sup>9</sup> *Northwest Airlines v. Goldschmidt*, 645 F.2d 1309, 1321 (D.C. Cir. 1981).

<sup>10</sup> *See Florida Power & Light Co. v. U.S.*, 846 F.2d 765, 772 (D.C. Cir. 1988).

<sup>11</sup> *See Omnipoint Corp. v. FCC*, 78 F.3d 620, 629 (D.C. Cir. 1996).

<sup>12</sup> *See Neighborhood TV Company, Inc. v. FCC*, 742 F.2d 629, 642 (D.C. Cir. 1984); *ITT World Communications, Inc. v. FCC*, 725 F.2d 732, 754 (D.C. Cir. 1984).

<sup>13</sup> *ITT World Communications, Inc.* 725 F.2d at 754; *see also Committee for Effective Cellular Rules v. FCC*, 53 F.3d 1309, 1319 (D.C. Cir. 1995); *WBEN Inc. v. FCC*, 396 F.2d 601, 618 (2d Cir. 1968).

biennial review of spectrum aggregation limits, the Commission emphasized the importance of regulatory certainty:

Providing regulatory certainty is particularly important in an environment in which there is likely to be widespread restructuring of CMRS spectrum holdings, for example, in apparent efforts to create national footprints or as the by-product of larger mergers within the telecommunications industry . . . . [R]egulatory certainty is critical to providing the industry with incentives to make investments, including in new technologies such as the 3G service.<sup>14</sup>

In addition, piecemeal enforcement is contrary to the Commission's obligation to achieve regulatory parity between substantially similar service providers—<sup>15</sup> an obligation that should apply with even greater force among providers of the same PCS service.

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<sup>14</sup> 1998 Biennial Regulatory Review Spectrum- Aggregation Limits for Wireless Telecommunications Carriers, Report and Order, 1999 FCC LEXIS 4623 at ¶ 50-51 (rel. Sep. 22, 1999); see also *Bell South v. FCC*, 162 F.3d 1215, 1224-25 (D.C. Cir. 1999) (noting that a spectrum cap, “unlike many other regulations, might actually require a bright-line rule to be effective”); *Turro v. FCC*, 859 F.2d 1498, 1500 (D.C. Cir. 1988) (holding that “strict adherence to a general rule may be justified by the gain in certainty and administrative ease, even if it appears to result in some hardship in individual cases”).

<sup>15</sup> See *Reorganization and Revision of Parts 1, 2, 21, and 94 of the Rules to Establish a New Part 101*, Memorandum Opinion and Order and Notice of Proposed Rule Making, FCC 00-33, 2000 FCC LEXIS 642 at ¶ 2 (rel. Feb. 14, 2000) (stating that new consolidated Part 101 furthers regulatory parity among fixed wireless services); see also *Eligibility for the Specialized Mobile Radio Services and Radio Services in the 220-222 MHz Land Mobile Band*, 12 FCC Rcd 9962, 9966 (1997) (holding that to allow “certain providers to achieve operating and spectrum efficiencies and competitive benefits while leaving regulatory obstacles for other CMRS providers conflicts with our ongoing goal to provide regulatory parity for commercial mobile services as mandated by Congress at” 47 U.S.C. § 332(c)(2)); *In the Matter of Implementation of Sections 3(n) and 332 of the Communications Act Regulatory Treatment of Mobile Services*, 9 FCC Rcd 2863, 2864 (1994) (in devising a regulatory structure to implement 47 U.S.C. § 332, the Commission intended to ensure symmetrical regulatory treatment of competing mobile service providers, to promote competition and economic growth in the mobile services marketplace, and to establish an appropriate level of regulation to protect consumers).

The issues raised regarding the utility of the spectrum cap and the DE provisions with respect to the July 26 reauction are inextricably linked to issues the Commission has either just examined or will soon examine in its biennial review of the spectrum cap. It would be irrational for the Commission to decide issues relating to the utility of the spectrum cap with respect to the July 26 reauction while deferring its determination regarding the overall utility of the cap until its biennial review. Moreover, the Commission has acknowledged that the spectrum cap and eligibility restrictions are related issues.<sup>16</sup> In light of the very nature and complexity of these issues to be addressed, their basic impact on the overall structure of the PCS industry and the number of parties interested in the outcome, the Commission should conclude that the questions raised in these proceedings should be considered in the biennial review or some broader rulemaking proceeding.<sup>17</sup> VoiceStream has repeatedly asserted that the solution is not to tinker with the rules to accommodate a specific auction event but to form a public policy based on careful consideration of the long term objectives for the industry as a whole. Uncertainty coupled with hasty scheduling of the reauction leaves bidders with little time to make critical business decisions regarding financing, network design and future business plans. In addition, rather than speeding the deployment of services to the public, instituting substantial changes to the rules through an expedited rulemaking unsupported by a full factual record could embroil the Commission in litigation and delay the auction

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<sup>16</sup> See Public Notice, *Wireless Telecommunications Bureau Seeks Comment on AT&T Wireless Services, Inc., BellSouth Corporation and Bell Atlantic Mobile, Inc. Petitions Regarding CMRS Spectrum Cap Limits*, DA 00-318 (Feb. 18, 2000).

<sup>17</sup> See *Aeronautical Radio, Inc.*, 535 FCC 2d 535, 536 (1980).

process further. VoiceStream therefore proposes delaying the auction until after a thorough and deliberative rulemaking proceeding has been completed.

**III. If Designated Entity Provisions are Eliminated or Modified, Transfer Restrictions Should also be Eliminated**

If the Commission decides to hold the July 26 reauction as presently scheduled and it eliminates or modifies the DE eligibility restrictions, fairness dictates that it must also eliminate the restrictions set forth in Section 24.839 of the Commission's rules on transfers of control or assignments of C and F block licenses.<sup>18</sup> Allowing non-DEs to acquire C and F Block licenses in the July 26 reauction while prohibiting the transfer of existing C and F Block licenses to non-DEs would violate the Commission's obligation to ensure symmetrical regulatory treatment of similarly situated service providers.<sup>19</sup> There is nothing inherently unique about this reauction that would justify disparate treatment of old versus new C and F Block licensees.

**IV. The Record Does Not Support Disaggregation of the C Block**

The disaggregation proposals set forth in the petitions and comments relating to the reauction are unsupported and should be rejected. New carriers, especially in large markets, need at least 30 MHz of spectrum to obtain financing and provide competitive services. In 1994, the Commission changed the then proposed 20 MHz C Block to a 30 MHz block, persuaded by an extensive record that a single 20 MHz block would not provide spectrum sufficient to support a viable competitor to the 30 MHz PCS MTA

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<sup>18</sup> 47 C.F.R. § 24.839.

<sup>19</sup> See note 15, *supra*.

licensees or to other CMRS providers.<sup>20</sup> Extensive formal comments and a public forum convinced the Commission that financing would be difficult to obtain for 20 MHz licensees, and that creation of an additional 30 MHz block was “essential” to fulfilling the goal of promoting competition.<sup>21</sup> The Commission revisited these issues in 1997, as part of its efforts to provide repayment options to C Block licensees, and decided to limit the ability of licensees to selectively disaggregate spectrum within an MTA.<sup>22</sup> The Commission rejected proposals that would have allowed licensees to disaggregate 10 MHz Blocks, recognizing that more spectrum is needed to facilitate attempts by new bidders to initiate service.<sup>23</sup> To date, changes in the PCS band plan have rested upon an extensive factual record. The current C Block allocation should not be discarded without an equally compelling record. At present, no such record exists.

The little evidence that has been submitted on this issue in the reauction proceedings supports retention of the existing band plan. Telephone & Data Systems, Inc. has pointed out that optional disaggregation has been historically rare in MTA and BTA markets, and that mandatory disaggregation would impose transaction and

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<sup>20</sup> See *Amendment of the Commission's Rules to Establish New Personal Communications Services*, Memorandum Opinion and Order, 9 FCC Rcd 4957 (June 13, 1994).

<sup>21</sup> See *id.* at 12; see also Transcript of the PCS Public Forum at 247-249 (April 12, 1994).

<sup>22</sup> See *Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services Licenses*, Second Report and Order, 12 FCC Rcd 16436, 16455 (1997).

<sup>23</sup> See *id.* at 16453, 16455.



regulatory costs on small entities.<sup>24</sup> CTIA has opposed disaggregation because it would disadvantage any carrier seeking to compete in markets where incumbents have at least 25 MHz of cellular spectrum or 30 MHz of PCS spectrum.<sup>25</sup> GTE comments that disaggregation would inhibit the plans of many potential bidders to use these bands for spectrum-intensive next-generation services.<sup>26</sup> SBC contends that splitting 30 MHz licenses could create technical issues that could disrupt service for existing customers. Specifically, SBC notes that many mobile phones were programmed on the assumption that there would be only one TDMA provider per band.<sup>27</sup> According to SBC's analysis, if three TDMA operators were to begin service on each of the 10 MHz portions of the band, phones belonging to customers of one carrier would frequently locate the signal of the others and therefore not provide service. Accordingly, the Commission should reject proposals to disaggregate the C Block.

## **V. Spectrum Cap**

VoiceStream opposes elimination, revision, waiver or forbearance of the spectrum cap if it solely with respect to the July 26 reauction. As stated above, the Commission should evaluate the utility of the spectrum cap in its biennial review or in the context of a broad rulemaking proceeding. Forbearance from applying the spectrum cap in the

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<sup>24</sup> See *Comments of Telephone and Data Systems, Inc.*, DA 00-191, at 5 (filed Feb. 22, 2000).

<sup>25</sup> See *Comments of the Cellular Telecommunications Industry Association*, DA 00-191, at 3-4 (filed Feb. 22, 2000).

<sup>26</sup> See *Comments of GTE Service Corporation*, DA 00-191, at 8 (filed Feb. 22, 2000).

<sup>27</sup> See *Comments of SBC Communications, Inc.*, DA 00-191, at 12, n.19 (filed Feb. 22, 2000).

reauction would be unfair to parties who were constrained by the cap in past C and F Block auctions and whose growth continues to be constrained by these regulations. Such action would violate the Commission's obligation to achieve regulatory parity among similarly situated wireless providers. In order to ultimately address the current utility of the cap, the Commission must assess the realistic spectrum needs of carriers to provide 3G services. At the end of this year the Commission will conduct its biennial review of the cap. The biennial review is an appropriate forum for evaluating the cap.

**VI. Conclusion**

For the foregoing reasons, the Commission should deny Petitioners' requests for an expedited rulemaking with respect to the July 26 reauction. If the Commission nevertheless conducts an expedited rulemaking and delivers relief from the current rules to auction participants, it must deliver similar relief to the wireless industry across the board.

Respectfully submitted,



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April 17, 2000

**CERTIFICATE OF SERVICE**

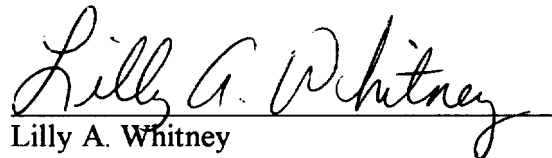
I, Lilly A. Whitney, a secretary at the offices of Morrison & Foerster, LLP, do hereby certify that I have on this 17th day of April, 2000, had copies of the foregoing "OPPOSITION OF VOICESTREAM WIRELESS CORPORATION" sent by U.S. First Class Mail, postage prepaid, to the following:

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